

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Request for Guidance Filed by the)	
Universal Service Administrative Company)	

**Reply Comments of the
Montana Telecommunications Association**

Submitted by:

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Introduction

MTA concurs in the comments of Public Knowledge and the National Hispanic Media Coalition and the National Telecommunications Cooperative Association.¹

As USAC points out in its request for guidance on the proper reporting of text messaging revenue, “carriers are reporting [text messaging] revenue in two different ways.”² The request for guidance raises both legal and policy matters regarding the Universal Service Fund.

Both Public Knowledge and NTCA provide ample evidence that text messaging is subject to universal service contributions. From a practical standpoint, text messaging is used interchangeably with voice communications. As Chairman Genachowski has pointed out, consumers now text emergency “calls” to 911 as easily as they dial 9-1-1 on their mobile phones.³ Moreover, as USAC states, at least some carriers—for now—report text message revenues as telecommunications service revenues subject to universal service contributions.

The fact that other carriers unilaterally have determined to remove text messaging revenues from the universal service contributions base raises disturbing policy questions. First, the Commission has seen before companies engaging in self-help unilateral regulatory decision-making schemes created by the Commission’s failure to act. Second, if allowed to continue in this context, the integrity of the Universal Service Fund will be threatened by the growing adoption of arbitrage activity in which carriers increasingly “determine” that more and more traffic is immune from universal service assessment.

¹ In the Matter of Universal Service Contribution Methodology (WC Docket No. 06-122). Comments of Public Knowledge and National Hispanic Media Coalition. June 6, 2011. MTA also acknowledges and supports the comments of the National Telecommunications Cooperative Association.

² Letter from Richard Belden, Chief Operating Officer of the Universal Service Administrative Company (USAC) to Sharon Gillett, Chief, Wireline Competition Bureau, Re: Request for Guidance on Universal Service Fund Contributor Matter. April 22, 2011.

³ See, for example, Prepared Remarks of Chairman Julius Genachowski before the 8th Annual 9-1-1 Honors Gala. Washington, D.C. March 29, 2011.

Text Messaging is Subject to Universal Service Contribution

In a Petition for Declaratory Ruling, Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, and U.S. PIRG pointed out that text messaging “differs in important ways from Title I information services such as email,” and instead should be classified as a Title II telecommunications service.⁴

Public Knowledge points out that “the Commission has scrupulously avoided declaring” the regulatory status of text messaging, although it “explicitly contrasted text messaging...with wireless broadband services [and it] included text messages in the same category as voice (as an extension of ‘services offered by CMRS carriers that are real-time, two-way switched voice or data service that are interconnected with the public switched network and utilize an in-network switching facility that enables providers to reuse frequencies and accomplish seamless hand-offs of subscriber calls’) when it extended automatic roaming obligations to text messages.”⁵

Public Knowledge goes on to describe the characteristics of text messaging which demonstrate that text messaging meets regulatory conditions that justify reporting of text messaging revenues as eligible for universal service contributions. “In addition to its treatment as a common carrier in the Commission’s Roaming Order, functionally text messaging is almost identical to commercial mobile radio service. Text messages use the North American Numbering Plan for basic service, they are interconnected with the public switched network, and they give users the ability to communicat[e] with others on the network.”⁶

⁴ *Op cit.* p. 3.

⁵ *Id.* p. 4.

⁶ *Id.* p. 5.

Further, text messaging meets the “functional equivalency” standard.⁷ As noted above, consumers readily use texts and voice calls interchangeably.⁸

In contrast, text messages are not information services. They do not rely on the Internet. They are more like a fax in this regard than an email.

The Commission Must Not Encourage Arbitrage

NTCA notes that the Telecommunications Act provides that “any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.”⁹ The public interest is not served by allowing text messaging to circumvent universal service contribution obligations.

The Commission’s failure to take action on the proper reporting of text messaging revenue allows telecommunications providers to use technological sleight of hand to circumvent obligations to contribute equitably to the

⁷ See IN THE MATTER OF Connect America Fund (WC Docket No. 10-90), A National Broadband Plan for Our Future (GN Docket No. 09-51), Establishing Just and Reasonable Rates for LECs (WC Docket No. 07-135), High-Cost Universal Service Support (WC Docket No. 05-337), Developing a Unified IC Regime (FCC Docket No. 01-92), Federal-State Joint Board on Universal Service (CC Docket No. 96-45), Lifeline and Linkup (WC Docket No. 03-109). Comments of the National Exchange Carriers Association, Inc.; National Telecommunications Cooperative Association; Organization for the Advancement and Preservation of Small Telecommunications Companies; Western Telecommunications Alliance; Eastern Rural Telecom Association; The Rural Alliance; and The Rural Broadband Alliance. April 1, 2011. Fn. 19. “The Commission has held that the question of whether one service is “like” another service for regulatory purposes significantly depends on customer perception. *See, e.g., American Tel. & Tel. Co. (DDS)*, Final Decision & Order, 62 FCC 2d 774 (1977), ¶ 75a. On appeal, the court of appeals affirmed, rejecting the argument that differences in technology should control. *American Broadcasting Cos. v. FCC*, 663 F.2d 133, 139, n.9 (D.C. Cir. 1980). A finding that two services are “like” one another based on customer perception would appear to preclude arguments that one is entitled to differential regulatory treatment. *See, e.g., The Offshore Tel. Co. v. South Central Bell*, Memorandum Opinion & Order, 2 FCC Rcd 4546 (1987), ¶ 32, *citing American Trucking Associations, Inc. v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966), *cert. denied* 386 U.S. 943 (1967) (“The statutory prohibition against unjust discrimination extends to different treatment for like services under like circumstances ...”).”

⁸ As USAC notes in its request for guidance, “SMS text messaging has been compared to paging and messaging service by the Commission.” Guidance Letter, p. 2. In a footnote, USAC cites the Second Annual CMRS Competition Report at 52. “Although cellular and paging can be considered complements, developments in digital technology make it possible to offer a paging-like service, such as Short Message Service (SMS), over a cellular or broadband PSC phone.)

⁹ In the Matter of Universal Service Contribution Methodology (WC Docket No. 06-122). Comments of The National Telecommunications Cooperative Association. June 6, 2011. p. 4.

preservation and advancement of the nation's public telecommunications infrastructure.

If allowed to continue with such arbitrage schemes, telecommunications providers will find more and more ways to create uncertainty with regard to the contributions base of the Universal Service Fund. To allow providers to carve out various flavors of traffic from universal service contributions effectively opens the door to additional carve-outs, until ultimately no traffic supports the Universal Service Fund.

Similar concerns have been expressed in relation to the Commission's failure to act on the proper treatment of voice over Internet Protocol (VoIP).¹⁰ While the treatment of VOIP is raised in the context of intercarrier compensation and the treatment of text messages is raised in the context of universal service, they both share the same characteristics in that the Commission's unwillingness to address the treatment of services which enjoy the functional and market equivalent of voice service has spawned arbitrage; and has threatened the predictability, sustainability and sufficiency of universal service itself.¹¹

¹⁰ Comments of National Exchange Carriers Association, et al. Op cit. p. 6. "Although the Commission has imposed numerous other telecommunications carrier-type obligations on interconnected VoIP providers, to the point where it is unclear what rationale exists for distinguishing them from telecommunications carriers, it has steadfastly declined to address intercarrier compensation obligations associated with VoIP traffic terminating on the PSTN."

¹¹ In the Matter of Connect America Fund (WC Docket No. 10-90), A National Broadband Plan for Our Future (GN Docket No. 09-51), Establishing Just and Reasonable Rates for LECs (WC Docket No. 07-135), High-Cost Universal Service Support (WC Docket No. 05-337), Developing a Unified IC Regime (FCC Docket No. 01-92), Federal-State Joint Board on Universal Service (CC Docket No. 96-45), Lifeline and Linkup (WC Docket No. 03-109). Reply Comments of the Montana Public Service Commission Regarding Section XV of the FCC February 9, 2011 NPRM. April 18, 2011. p 3. "As stated by one roundtable participant, "VoIP carriers look like telecommunications providers, act like telecommunications providers, and offer services that are considered by consumers to be a replacement for services provide by telecommunications providers." By the time a VoIP call is terminated on the Public Switched Telephone Network (PSTN), the call requires the same elements of the PSTN to terminate that call that any other call does, regardless of the technology used to generate the call. The ICC charges paid by a provider of calls terminating on the PSTN certainly should not differ because of the technology used to generate the call. ICC charges should be technology neutral." (footnote deleted.) MTA believes that neither intercarrier compensation nor universal service obligations of providers should be treated differently because of technology used.

The Commission Needs to Address Contributions Reform Immediately

As numerous parties have argued, the Commission has neglected to address the declining universal service contributions base. Both wireline and wireless contributions are diminishing even though there is no evidence that telecommunications traffic is diminishing. Rather, it is far more likely that telecommunications providers are simply self-characterizing traffic as non-universal service traffic. The fact that at least one wireless carrier unilaterally has removed text messaging from the USF contributions base is a stark illustration of what happens when the Commission allows providers to help themselves to arbitrage opportunities that Commission inaction creates.

Conclusion

The Commission must not allow further avoidance of proper reporting of universal service revenues. Ample legal grounds exist to determine once and for all that text messaging revenues should be subject to universal service contributions. Moreover, as a matter of sound public policy and in the public interest, the Commission needs to put an end to schemes which avoid universal service contribution obligations and ultimately violate the purposes of the Universal Service Fund to provide sufficient, predictable and sustainable support for the advancement and preservation of universal service.

Respectfully Submitted,

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